Supreme Court, U.S.
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In The

Supreme Court of the United States

LANCE PISMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Seventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Criminal liability under this Court's *Pinkerton* doctrine requires a conspiracy. Prosecutors argued that the conspiracy charged in Count I of Lance Pisman's indictment formed the basis for conviction on Count III under *Pinkerton*. The trial court instructed the jury that it could convict on Count III only if it found that the Count I conspiracy existed. Lance Pisman was acquitted of this conspiracy, yet he was convicted on Count III. Did the Court of Appeals err and expand the *Pinkerton* doctrine beyond its foundation and create conflict with this Court's *Pinkerton* decision when affirming Lance Pisman's conviction and ruling that the conspiracy acquittal did not foreclose a conviction on Count III under *Pinkerton*?

2. The *Pinkerton* doctrine of vicarious liability creates a relationship between a conspiracy and a substantive offense. The Court of Appeals acknowledged the doctrine of *Pinkerton* yet applied the rule of *United States v. Powell* which states that the mere inconsistency in verdicts is not a basis for a judgment of acquittal and that each count in an indictment is regarded as if it were a separate indictment. Did the Court of Appeals create conflict with this Court's *Powell* decision by holding that *Powell's* rule regarding inconsistent verdicts applies to the *Pinkerton* vicarious liability situation in this case?

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PRAYER

Petitioner, Lance Pisman, respectfully prays that a writ of certiorari issue to review the judgment and order of the Seventh Circuit.

OPINION BELOW

The Seventh Circuit's opinion affirming the petitioner's conviction is published at 443 F.3d 912 and is attached in Appendix 1 (App. 1).

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered judgment affirming the Petitioner's conviction on April 7, 2006. (App. 1). The United States Court of Appeals for the Seventh Circuit entered an order denying Petitioner's Motion for Rehearing on May 31, 2006. This petition has been filed within 90 days of the Seventh Circuit's order denying a petition for rehearing. This Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

COMMON LAW INVOLVED

1. Under the *Pinkerton* doctrine, when overt acts occurring within a conspiracy constitute a substantive offense, a conspirator may be convicted of the substantive offense committed by a co-conspirator. The elements for such liability include:

1. The offense was committed in furtherance of the conspiracy;

2. The offense fell within the scope of the unlawful project;

3. The offense was reasonably foreseeable as a necessary or natural consequence of the unlawful agreement. *Pinkerton v. U.S.*, 328 U.S. 640 (1946).

2. In *United States v. Powell*, not a *Pinkerton* vicarious liability case, this Court held that inconsistent jury verdicts are not a basis for a judgment of acquittal. *United States v. Powell,* 469 U.S. 57 (1984).

STATEMENT OF THE CASE

Throughout this case the government maintained that its theory on Count III was a *Pinkerton* theory. During pretrial motion hearings the government stated:

> . . . Our theory in Count III is a *Pinkerton* theory. . . . we're arguing the *Pinkerton* theory on Count III, that Jake Wilkerson's [Lance Pisman's codefendant and alleged coconspirator] use of that computer in this case is foreseeable and in furtherance of the conspiracy itself. So, it is linked to Count I of this indictment. In order to find him [Lance Pisman] guilty of Count III you must find him guilty of Count I. That's the government's theory.

(Transcript of Motion Hearing, 8/31/04, p. 11, 12 (hereinafter Tr. 8/31)).

The trial court followed with questions about the government's *Pinkerton* liability theory. The prosecution answered those questions by stating,

> If they [the jury] find him [Pisman] guilty in Count I, which is a conspiracy count, then they can find him guilty of Count III because his codefendant, Jake Wilkerson, used a means of interstate commerce in order to facilitate the conspiracy in this case. . . . So, Count I and Count III are linked on a *Pinkerton* conspiracy theory, your Honor.

(Tr. 8/31, pp. 13, 14).

The trial judge immediately followed with a question that addressed the scope of the government's theory. Judge McDade asked, "Now Count III is not aiding and abetting?" The prosecutor responded,

> Count III we're going . . . under a *Pinkerton* conspiracy theory. We're going to ask the court to enter a jury instruction instructing the jury on a *Pinkerton* theory, that if Mr. Pisman was part of the conspiracy as charged in Count I, then the jury can find Mr. Pisman guilty of the codefendant's conduct as it pertains to Count III.

(Tr. 8/31, pp. 14, 15).

The government explained its *Pinkerton* theory in its opening statement. The prosecutor told jurors, "We are not alleging that Lance Pisman had any direct contact with any of these minors. The intent [*sic*] [internet] contact with these minors were made through the defendant's coconspirator Jake Wilkerson." (Transcript of Jury Trial, Vol I., p. 49 (hereinafter Tr.)).

At the jury instruction conference the government submitted government's instruction 19A, which was a stock version of Seventh Circuit Pattern Instruction 5.09. This instruction was the government's *Pinkerton* instruction. (R. Vol. III, Doc. 95), App. 16. The trial court ruled that the government's *Pinkerton* instruction would be given to the jury. *Id.* The government's *Pinkerton* instruction stated

> A conspirator is responsible for offenses committed by his fellow conspirators if he was a member of the conspiracy when the offense was committed in furtherance of and as a foreseeable consequence of the conspiracy. Therefore, if you find the defendant guilty of the conspiracy charged in Count 1 and if you find beyond a reasonable doubt that while he was a member of the conspiracy, his fellow conspirator committed the offense in Count 3 in furtherance of and as a foreseeable consequence of that conspiracy, then you should find him guilty of Count 3.

Id.

In his closing argument the prosecutor explained his *Pinkerton* theory to the jury.

> If you recall, I told you during opening statements that the U.S. would not be alleging that the defendant had any direct internet contact with the minors, Tyler or Lenny. Judge McDade will instruct you that . . . a conspirator is responsible for the offenses committed by his fellow co-conspirators if he was a member of the conspiracy when the offense was committed, and if the offense was committed in furtherance of and as a foreseeable consequence of a conspiracy. Therefore, if you find the defendant guilty of the conspiracy charged in Count I, and if you find beyond a reasonable doubt that while he was a member of that conspiracy, his fellow conspirator

> committed the offense in Count III, in furtherance and as a foreseeable consequence of the conspiracy, then you should find him guilty of Count III as well.

(Tr., Vol. V, p. 871).

The jury returned verdicts on all counts. With respect to Count I, Lance Pisman was found not guilty of conspiring with Jacob Wilkerson to travel in interstate commerce for the purpose of illicit sexual activity. On Count II, Lance Pisman was found not guilty of traveling in interstate commerce for the purpose of illicit sexual activity. On Count III, the jury found Lance Pisman guilty of using a facility or means of interstate commerce to knowingly persuade, induce, entice or coerce a minor to engage in sexual activity. (Tr. Vol. V, pp. 945, 946).

The trial court denied Lance Pisman's Motion for a Judgment of Acquittal pursuant to Rule 29(c). (Tr. Vol. III, Doc. 105), App. 9.

Even though the jury acquitted Mr. Pisman of the conspiracy that formed the basis for *Pinkerton* liability on Count III, the Seventh Circuit affirmed the conviction on that Count. Rather than focus on the requirements of the *Pinkerton* doctrine the Seventh Circuit described this situation as one of inconsistent verdicts. *United States v. Pisman*, 443 F.3d 912, 914 (7th Cir. 2006). The court invoked the rule of *United States v. Powell,* which was not a *Pinkerton* vicarious liability case, for the proposition that mere inconsistency between verdicts was not a basis for a judgment of acquittal. *Pisman,* 443 F.3d at 914, *citing United States v. Powell*, 469 U.S. 57 (1984). The Seventh Circuit denied Mr. Pisman's Petition for Rehearing and Suggestion for Rehearing *En Banc* on May 31, 2006. (App. 15).

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT OPINION CONCLUDES THAT MR. PISMAN'S CONVICTION ON COUNT III CAN BE AFFIRMED EVEN THOUGH THE JURY ACQUITTED HIM OF THE CONSPIRACY THAT FORMED THE BASIS FOR THE GOVERNMENT'S *PINKERTON* THEORY. THE SEVENTH CIRCUIT'S OPINION DIRECTLY AND APPARENTLY CONFLICTS WITH PRIOR DECISIONS OF THE UNITED STATES SUPREME COURT AND THE OPINION IS INCONSISTENT WITH SETTLED *PINKERTON* LAW.

The Seventh Circuit's opinion in this case held that Lance Pisman's conviction on Count III can be affirmed even though the jury acquitted him of the conspiracy that formed the basis of the government's *Pinkerton* theory. The court's holding expands the powerful *Pinkerton* doctrine beyond its foundation. The Seventh Circuit opinion is inconsistent with this Court's decision in *United States v. Pinkerton*, 328 U.S. 640 (1946). The Seventh Circuit's opinion also conflicts with settled *Pinkerton* law that has been handed down by the Seventh Circuit and sister circuits.

The government's theory on Count III was that Lance Pisman's criminal liability for Count III derived solely from his membership in the conspiracy charged in Count I. The government sought to prove Lance Pisman's guilt on Count III by invoking the doctrine of *Pinkerton v. United States*, 328 U.S. 640, 647 (1946). *Pinkerton* declared that when a criminal conspiracy is proven to exist each member of a conspiracy can be charged with the foreseeable substantive crimes of his coconspirators, even if he did not

actually participate in the crimes himself. *Id.* The *Pinkerton* doctrine is based on the idea that the conspirators are agents of each other and just as a principle is bound by the acts of his agents within the scope of the agency, so is a conspirator bound by the acts of his co-conspirators. *Pinkerton*, 328 U.S. at 670; *United States v. Elizondo*, 920 F.2d 1308 (7th Cir. 1990) (*citations omitted*). Stated another way, *Pinkerton* liability is vicarious liability. *United States v. Stott*, 245 F.3d 890, 909 (7th Cir. 2001). Thus, *Pinkerton* liability is triggered only when the government proves a conspiracy.

In *United States v. Stott*, 245 F.3d 890 (7th Cir. 2001), the defendants were charged and convicted of various substantive drug crimes and conspiracy to distribute cocaine. One defendant, Ford, raised as an error the District Court's *Pinkerton* jury instruction. *Stott*, 245 F.3d at 907. This Court ruled that the District Court's instruction did not inform the jury of the necessary requirements for applying the *Pinkerton* doctrine. *Id.* at 908. Nevertheless, this Court ruled that Ford's challenge to the inadequate *Pinkerton* instruction lacked any merit.

> Mr. Ford was not convicted of the conspiracy charged in Count I. However, the court's *Pinkerton* instruction required the jury to find that the defendant participated in the conspiracy before it could hold him vicariously liable for the actions of the co-conspirators. *See,* R. 295, Inst. 52 ('Therefore, *if you find the defendant guilty of conspiracy* as charged in Count I . . . then you should find him guilty of Counts 2, 3, 4 and/or 5.) (*emphasis added*)': . . . Because the jury had no occasion to apply the *Pinkerton* instruction to Ford, he was not prejudiced by the instruction. Consequently, we shall not reverse his conviction on this basis.

Id. at 909. Like Mr. Ford, Lance Pisman was not convicted of the conspiracy charged in Count I of his case. And just

like the *Pinkerton* instruction in Mr. Ford's case the instruction in this case required the jury to find that Lance participated in the conspiracy before it could hold him vicariously liable for the actions of the coconspirators. (Therefore, *if you find the defendant guilty of the conspiracy charged in Count I . . .* then you should find him guilty of Count III. R. Vol. III, Doc. 95, Government's Instruction 19A) *(emphasis added)*, App. 16. This court held that Mr. Ford's jury had no occasion to apply the *Pinkerton* instruction in his case because that jury acquitted him of the conspiracy charge that he faced. Likewise, Mr. Pisman's jury had no occasion to apply the *Pinkerton* instruction because that jury acquitted Mr. Pisman of the conspiracy charge he faced in Count I of his indictment.

In *United States v. Chairez*, 33 F.3d 823 (7th Cir. 1995), this court vacated a defendant's conviction for carrying a firearm during or in relation to a drug trafficking offense because that conviction was not supported by sufficient evidence. The court then ruled that the case would be remanded for further findings on the *Pinkerton* doctrine. *Chairez*, 33 F.3d at 826, 827. When the court addressed the issue of the remand it observed "Of course, in order to convict a defendant under a *Pinkerton* theory there must first be a conspiracy." *Id.* at 827. Circuit Judge Pell dissented on the issue of the remand. *Id.* at 828. Although he dissented, Judge Pell had no disagreement with the majority's discussion about the requirements of the *Pinkerton* doctrine. Judge Pell stated, "The linchpin, without which *Pinkerton* is inoperative, is that there must be a conspiracy." *Id.* at 829.

In *United States v. Graewe*, 774 F.2d 106 (6th Cir. 1985), Fritz Graewe filed a petition for rehearing after his

conviction was affirmed by a panel of the Sixth Circuit. In his petition for rehearing Fritz Graewe argued that the appellate panel in his case should not have relied upon the *Pinkerton* doctrine to sustain his onvictions on various substantive counts. *Graewe*, 774 F.2d at 107. That same appellate panel considered Graewe's petition for rehearing and concluded that he raised a meritorious objection to the reliance upon the *Pinkerton* doctrine to sustain his convictions on various substantive counts. *Id.*

To reach that conclusion, the court first established the elements of the *Pinkerton* doctrine. "A jury must determine whether a conspiracy existed, whether the alleged conspirator was a member of that conspiracy, and whether the charged substantive offense was committed in furtherance and as part of the conspiracy. *Id.* (*citing Nye & Nissen, Inc. v. United States*, 336 U.S. 613, 618 (1949)). Then the court established that a continuing criminal enterprise charge is a conspiracy charge and one convicted of a CCE is subject to *Pinkerton* liability. *Graewe*, 774 F.2d at 108 (*citations omitted*).

The court then noted that the District Court pursuant to Fed. R. Crim. P. 29(a) acquitted Fritz Graewe of the RICO count and the jury acquitted him of the CCE count. The court then addressed the government's argument that more was required to prove a CCE than to prove a criminal conspiracy and that Fritz Graewe could have been convicted of a conspiracy, although acquitted of the CCE. *Id.* The court agreed with the government's observation but remarked that the indictment did not charge Fritz Graewe with a conspiracy and the jury was not instructed that he could be convicted of a conspiracy. The court held that the jury as a matter of law did not find the defendant,

Graewe, was a member of a conspiracy and *Pinkerton* liability could not attach under these circumstances. *Id.*

Here, the jury's verdict on Count I established as a matter of law that Lance Pisman was not guilty of the conspiracy that the government argued formed the basis for *Pinkerton* liability. Once the jury acquitted Lance Pisman of the conspiracy charged in Count I the jury had no occasion to apply the *Pinkerton* instruction to Count III.

The Seventh Circuit has recognized the power of the *Pinkerton* doctrine as a prosecutorial tool. *United States v. Elizondo*, 920 F.2d 1308, 1317 (7th Cir. 1990). The Seventh Circuit's opinion has increased the power of that doctrine exponentially by affirming the conviction on a substantive offense based on *Pinkerton* liability when the jurors acquitted the defendant of the conspiracy that formed the basis for *Pinkerton* liability. "The due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re: Winship*, 397 U.S. 358 (1970). By invoking *Pinkerton*, the government made the conspiracy charge in Count I an element of the substantive offense charged in Count III. When the jury acquitted on the conspiracy charge, they had no occasion to apply the *Pinkerton* instruction. The acquittal on the conspiracy charge foreclosed a conviction on Count III. The Seventh Circuit's opinion directly conflicts with this Court's decision in *Pinkerton*. Certiorari should be granted to erase the conflict created by the Seventh Circuit opinion and reestablish the foundation of the *Pinkerton* doctrine.

II. THE SEVENTH CIRCUIT'S APPLICATION OF *UNITED STATES V. POWELL* TO THE *PINKERTON* VICARIOUS LIABILITY SITUATION IN THIS CASE DIRECTLY CONFLICTS WITH THE HOLDING OF *POWELL*.

The Seventh Circuit's opinion is the only reported opinion in the Federal Circuit Court of Appeals that has held that a conviction for a substantive offense based on *Pinkerton* liability can stand after the jury acquitted the defendant of the conspiracy that formed the basis for *Pinkerton* liability. To reach this conclusion the Seventh Circuit applied *United States v. Powell*, 469 U.S. 57 (1984). In *Powell*, a jury acquitted the defendant of conspiracy to possess cocaine and the possession of cocaine but found her guilty of violating 21 U.S.C. § 243(b) because she used the telephone to facilitate those offenses. The United States Supreme Court held that the case presented a situation of inconsistent verdicts and that mere inconsistency is not a basis for a judgment of acquittal. The Seventh Circuit is dead wrong when it states, "The nature of this case as one involving the *Pinkerton* co-conspirator theory does not differentiate it from those cases [involving inconsistent verdicts], as Pisman's theory ultimately rests on the same assumption that the acquittal, rather than the conviction, is the 'right' jury verdict". (*United States v. Pisman*, 443 F.3d 912, 915). Comparing a pattern jury instruction for a violation of 21 U.S.C. § 243(b), the offense at issue in *Powell*, and the *Pinkerton* liability instruction demonstrate that the Seventh Circuit is wrong.

The Seventh Circuit's pattern *Pinkerton* instruction, which was given in Mr. Pisman's case, distills settled *Pinkerton* law. It stated:

> A conspirator is responsible for offenses committed by his fellow conspirators if he was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of and as a foreseeable consequence of a conspiracy. Therefore, if you find the defendant guilty of the conspiracy charged in Count I and if you find beyond a reasonable doubt that while he was a member of the conspiracy, his fellow conspirator committed the offense in Count III in furtherance and as a foreseeable consequence of that conspiracy, then you should find him guilty of Count III. (R.Vol. III, Doc. 95).

A pattern jury instruction that establishes the elements for facilitation, 21 U.S.C. § 843(b), reads:

> In order to sustain its burden of proof for the crime of using a communication facility as charged in Count ___ of the indictment, the government must prove the following two (2) essential elements beyond a reasonable doubt:
>
> One: Defendant _____ knowingly used a communication facility as that term is defined in these instructions; and
>
> Two: Defendant _____ used the communication facility with the intent to [*commit*] [*facilitate the commission of*] an illegal act involving drugs, namely, – (*detail felony alleged in the indictment*)

Federal Jury Practice and Instructions § 65.03 (5th ed.).

In the *Pinkerton* instruction in this case the first requirement was that the jury must have found Lance Pisman guilty of the conspiracy charged in Count I. This

requirement reflects *Pinkerton* theory and law. The requirement that the jury must have found Lance Pisman guilty of the conspiracy charged in Count I reflects that conspirators are agents of each other and just as a principle is bound by the acts of his agents within the scope of the agency, so is the conspirator bound by the acts of his coconspirators. Because the jury acquitted Lance Pisman of the conspiracy they had no occasion to apply the *Pinkerton* instruction. *United States v. Stott*, 245 F.3d 890, 909 (7th Cir. 2001). Without a guilty verdict on the conspiracy there are no coconspirators that are agents of each other. And, there is no vicarious liability.

By comparison, the elements of a violation of 21 U.S.C. § 843(b) do not specifically require a guilty verdict on what is described as the predicate offense before the jury can find a defendant guilty of facilitating that offense (the compound offense). Facilitation is not a vicarious liability offense. In a *Pinkerton* case, there must be a connection between the co-conspirators, the conspiracy and the substantive offense for criminal liability. A jury instruction which outlines the *Pinkerton* doctrine illustrates how a defendant's membership in the conspiracy becomes part of the facts necessary for a conviction on the substantive counts referenced in this instruction. *United States v. Rosenberg*, 888 F.2d 1406, 1417 (D.C. Cir. 1989) (*concurring opinion*). There are no similar legal requirements in a facilitation case such as the one that was the basis for the Court's opinion in *Powell*. Both the predicate offense and the compound offense can and must stand on its own. To the contrary, a conviction on a substantive offense based on *Pinkerton* liability requires a conspiracy. An acquittal on the conspiracy forecloses *Pinkerton* liability.

The holding of *Powell* is that a defendant is not entitled to relief from inconsistent verdicts because relief would rest on the assumption that the acquittal on the predicate offense rather than the conviction on the compound offense is the right jury verdict. Pisman's situation is factually and legally distinguishable from the inconsistent verdict situation. The question is not whether the not guilty verdict on the conspiracy charged in Count I is right and the conviction on the substantive offense charged in Count III is wrong. Rather the question is what effect does the acquittal on Count I have on the government's effort to prove Count III, a substantive offense based on *Pinkerton* liability. The answer is established by *Pinkerton*, *Stott*, and *Graewe*.

The Seventh Circuit's opinion notes that *Powell* teaches that each count in an indictment is regarded as if it were a separate indictment. *United States v. Pisman*, 443 F.3d at 914. However, the Seventh Circuit did not apply this analysis. In Count I, the conspiracy count, the jury first considered whether the conspiracy charged in Count I existed, second that Lance Pisman knowingly became a member of the conspiracy with an intention to further the conspiracy, and third, an overt act was committed by at least one conspirator in furtherance of the conspiracy. The acquittal is an acknowledgment that the government failed to prove the essential elements of the conspiracy charged in Count I beyond a reasonable doubt. *See, United States v. Watts*, 519 U.S. 148, 155 (1997) (*citations omitted*).

Count III charged a violation of 18 U.S.C. § 2422(b). To convict, the government had to prove beyond a reasonable doubt that Lance Pisman used a means of interstate commerce to knowingly persuade, induce, entice or coerce a minor to engage in sexual activity. Prior to trial the

government conceded to the court and counsel that it could not prove beyond a reasonable doubt that Lance Pisman committed this offense. The government's concession was repeated at trial in the opening statement and closing argument. Following these concessions, the government explained to the court, counsel and jury that it was invoking the *Pinkerton* doctrine. The elements of the *Pinkerton* doctrine were established in the *Pinkerton* instruction.

Thus, this is not a case such as *Powell* where each count of an indictment could be regarded as if it were a separate indictment. The government invoked the *Pinkerton* doctrine in an effort to win a conviction where it otherwise could not. The *Pinkerton* doctrine and corresponding instruction created a relationship between Count I and Count III of this case. This situation is completely distinguishable from the so called predicate and compound offenses in *Powell* each of which could stand as a separate indictment. The premise of *Powell* is that each count could stand alone. This premise leads to the *Powell* holding that a defendant is not entitled to relief from inconsistent verdicts because relief would rest on the assumption that the acquittal on the predicate offense rather than a conviction on the compound offense is the right verdict. *Powell*, 469 U.S. at 63-65.

This holding cannot be applied to a situation such as the present case where the government is relying on *Pinkerton* vicarious liability. The government acknowledged that Count III could not stand on its own and invoked the *Pinkerton* doctrine as its theory of liability. A relationship between Count I and III was created by the *Pinkerton* jury instruction. The trial court instructed the jury not to consider *Pinkerton* liability as to Lance Pisman on Count III unless it first determined that Lance Pisman was guilty on Count I. The jury's not guilty verdict on

Count I precluded a guilty verdict under the *Pinkerton* doctrine. The Seventh Circuit's application of the inconsistent verdict rule of *Powell* conflicts with this Court's decisions in both *Powell* and *Pinkerton*. The Seventh Circuit opinion created conflict with this Court's decision in *Powell* by holding that *Powell's* rule regarding inconsistent verdict applies to the *Pinkerton* vicarious liability situation in this case. Certiorari must be granted to resolve this conflict and reestablish the bounds of *United States v. Powell*.

CONCLUSION

In this case the Petitioner, Lance Pisman, respectfully prays that this Honorable Court grant this Petition and issue a writ of certiorari to vacate or review the judgment of the Seventh Circuit. The Seventh Circuit's opinion conflicts with this Court's opinions in *Pinkerton* and *Powell*.

Respectfully submitted,

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In the United States Court of Appeals for the Seventh Circuit

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Nos. 05-1625 & 05-1899

UNITED STATES OF AMERICA,

Plaintiff-Appellee, Cross-Appellant,

v.

LANCE PISMAN,

Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court
for the Central District of Illinois.
No. 04 CR 10028 – Joe Billy McDade, *Judge*.

ARGUED SEPTEMBER 25, 2005 – DECIDED APRIL 7, 2006

Before EASTERBROOK, RIPPLE, and ROVNER, *Circuit Judges*.

ROVNER, *Circuit Judge*. In March 2004, a federal grand jury returned an indictment against Lance Pisman and Jacob Wilkerson. Counts 1 and 2 charged both men with conspiracy to travel for sexual conduct with a minor in violation of 18 U.S.C. §§ 2423(b) and (e), and interstate travel for sexual conduct with a minor in violation of 18 U.S.C. § 2422(b). A third count charged Wilkerson with the use of interstate commerce to entice a minor to engage in illicit sex, in violation of 18 U.S.C. § 2422(b). Wilkerson subsequently pled guilty to Counts 1 and 2, and on June 16, 2004, the grand jury returned a superceding indictment mirroring the

original two counts but adding Pisman as a defendant to Count 3.

At trial, Wilkerson testified against Pisman, and the government introduced into evidence 25 internet chats between Pisman and Wilkerson. That testimony and the internet communications established that Pisman and Wilkerson had a sexual relationship, and that the two made plans for Pisman to travel from his residence in Iowa to Illinois in order to meet with Wilkerson and others to engage in sex. Wilkerson was communicating with the other persons who would meet with them, and the internet correspondence and testimony also provided evidence that Pisman was aware that one or more of those persons were teenage boys who were minors. Because Wilkerson, rather than Pisman, was the one who made contact with the minors, Pisman's liability under count 3 was premised upon the existence of a conspiracy with Wilkerson as charged in Count 1. Under the doctrine set forth in *Pinkerton v. United States*, 328 U.S. 640 (1946), a defendant may be found guilty of a substantive offense committed by a co-conspirator if the offense was committed in furtherance of the conspiracy at the time the defendant was a member of the conspiracy, even if the defendant neither participated in nor had knowledge of the substantive offense. Relying on that theory, the government argued that Pisman and Wilkerson were members of a conspiracy in Count 1 to travel for sexual conduct with a minor, and that Wilkerson as a member of that conspiracy, used interstate commerce (the internet) to entice a minor to engage in illicit sex. The court accordingly issued the *Pinkerton* instruction with respect to Count 3, which stated that:

> A conspirator is responsible for offenses committed by his fellow conspirators if he was a member

> of the conspiracy when the offense was committed and if the offense was committed in furtherance of and as a foreseeable consequence of the conspiracy. Therefore, if you find the defendant guilty of the conspiracy charged in Count I and if you find beyond a reasonable doubt that while he was a member of the conspiracy, his fellow conspirator committed the offense in Count III in furtherance of and as a foreseeable consequence of that conspiracy, then you should find him guilty of Count III.

Although the government's argument essentially tied liability under Count 3 to guilt on the conspiracy charge of Count 1, the jury had other ideas. The jury acquitted Pisman of Counts 1 and 2, and found him guilty of Count 3. Pisman now argues that the conspiracy acquittal forecloses a conviction on Count 3 under the *Pinkerton* doctrine, and that the district court erred in denying his motion for judgment of acquittal on that count.

Despite Pisman's extensive efforts to characterize it otherwise, this situation is one of inconsistent verdicts, and the Supreme Court has made clear that the mere inconsistency is not a basis for judgment of acquittal. In *United States v. Powell,* 469 U.S. 57 (1984), the Court addressed a situation analogous to the one presented here. In that case, a jury acquitted the defendant of conspiracy to possess cocaine and of possession of cocaine, but nevertheless found her guilty of using the telephone to facilitate those offenses. The appellate court reversed the conviction, holding that the acquittal on the predicate felony necessarily indicated that there was insufficient evidence to support the telephone facilitation conviction and mandated acquittal on tha[illegible]ount as well. *Id.* at 61. The Court rejected that reasoning and reiterated its established

ruling that the inconsistency in jury verdicts is not a basis for reversal except in the situation in which two guilty verdicts cannot coexist. *Id.* at 68-69. In reaching that conclusion, the Court reiterated that each count in an indictment is regarded as if it were a separate indictment. *Id.* at 62. Quoting a prior opinion, the Court stated that where a jury returns an inconsistent verdict, "'[t]he most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than the assumption of a power which they had no right to exercise, but which they were disposed through lenity.'" *Id.* at 63, *quoting Dunn v. United States,* 284 U.S. 390, 393 (1932). Thus, although the inconsistency in the verdicts certainly reflected an " 'error' in the sense that the jury has not followed the court's instruction . . . it is unclear whose ox has been gored." *Id.* at 65. A number of factors weighed against allowing review of verdicts based solely on inconsistency, including the difficulty in determining in whose favor the "error" was made, the inability of the government to invoke review of the acquittal, and the reluctance to inquire into the inner workings of the jury. *Id.* at 68-69. Moreover, a defendant was protected from jury irrationality as to an individual count by the independent review of the sufficiency of the evidence, which would ensure that the evidence supported a rational determination of guilt beyond a reasonable doubt as to that count. *Id.* at 67.

In this case, Pisman does not contest that the government presented sufficient evidence to support a determination of guilt beyond a reasonable doubt as to Count 3. The only contention is that the jury could not find that

guilt without first determining that he was guilty of the predicate offense of Count 1, and therefore that the finding of guilt cannot stand. The *Powell* Court, however, explicitly rejected the argument that an exception should be made to the inconsistent verdict rule where the jury acquits a defendant of a predicate felony but convicts on the compound felony. The Court noted that the argument for such an exception misunderstands the nature of the inconsistent verdict problem, and suffers from the same defect in that it assumes that the acquittal was the right verdict – the one the jury "'really meant.'" *Id.* at 68. Accordingly, the Court rejected the invitation to create an exception to the inconsistent verdict rule.

We similarly rejected such an argument recently in *United States v. McGee*, 408 F.3d 966 (7th Cir. 2005). In that case, a defendant, Harold McKinzie, argued that his conviction was improper because the jury acquitted him of the underlying conspiracy charge but convicted him of the compound offense of use of a telephone to facilitate the conspiracy. We held that his argument was precluded by *Powell,* noting that reversal as a matter of course in such situations was improper, especially considering that the acquittal may have been the result of juror mistake, compromise or lenity. *Id.* at 985. *See also United States v. Flaschberger,* 408 F.3d 941, 943 (7th Cir. 2005) (holding that inconsistent verdicts do not entitle the defendant to relief, and noting that an inconsistent acquittal may demonstrate mercy or confusion rather than innocence); *United States v. Dykes,* 406 F.3d 717 (D.C. Cir. 2005). The nature of this case as one involving the *Pinkerton* co-conspirator theory does not differentiate it from those cases, as Pisman's theory ultimately rests on the same assumption that the acquittal rather than the conviction is

the "right" jury verdict. Pisman's situation is factually indistinguishable from the cases above in which a jury acquitted on the predicate offense and convicted on the compound offense that necessarily incorporated that predicate offense. *See United States v. Gallo-Chamorro,* 48 F.3d 502 (11th Cir. 1995) (noting that inconsistent verdicts are not a ground for reversal in a case in which the jury convicted the defendant of importation under the *Pinkerton* co-conspirator theory but acquitted him of the conspiracy count.) Accordingly, the district court properly denied Pisman's motion for judgment of acquittal.

That does not end this appeal, however, because the government cross-appealed as to the sentence imposed by the judge in this case. The Guidelines range for Pisman's sentence was 108-135 months. Of course, the district court has discretion to sentence above or beyond that range, but in determining the appropriate sentence the district court must take into consideration the Guidelines recommendation as well as the sentencing factors in 18 U.S.C. § 3553(a). Those factors include the nature and circumstances of the offense, the history and characteristics of the defendant, and the need for the sentence to: reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, provide the defendant with needed educational or vocational training, and avoid unwarranted sentence disparities among defendants. The issue in this case concerns the last factor, the need to avoid unwarranted sentence disparities among defendants.

The district court in this case determined that a sentence of 60 months was appropriate, which was the statutory minimum but was 48 months below the Guidelines range. In reaching that conclusion, the court expressed its concerns

that Pisman's sentence be reconciled with the sentence provided to his co-defendant Wilkerson. The trial evidence indicated that Wilkerson was the primary actor in the offense, and the one that the public at least would view as the more culpable. Wilkerson pled guilty to the offenses, however, and cooperated with the government in its prosecution of Pisman. As a result of the cooperation, Wilkerson was sentenced to only 68 months imprisonment.

The district court noted that Pisman's predatory activity was not nearly as substantial as Wilkerson's, and attempted to fashion a sentence that reflected that difference. Accordingly, the court sentenced Pisman to 60 months. The district court made clear that the 60-month sentence was directly related to the perceived disparity with Wilkerson's sentence, stating:

> [H]ad Jake Wilkerson's sentence been more, the defendant's sentence would be more, but those who knew of both Mr. Wilkerson's and Mr. Pisman's conduct probably would not understand if Mr. Pisman got a higher sentence than Jake Wilkerson, and they probably would not appreciate the complexities of the guidelines that knock off something for acceptance of responsibility.

Sent. Tr. at 97. That comparison of co-defendants, however, is not a proper application of the § 3553(a) mandate that a court minimize unwarranted disparities in sentences. First, the lower sentence for Wilkerson was attributable to his decision to plead guilty to the offense and his cooperation with the government, which is a legally appropriate consideration. The corresponding reduction in his sentence as compared to a non-cooperating defendant is not an "unwarranted" disparity. *United States v. Boscarino,* 437 F.3d 634, 637-38 (7th Cir. 2006). Moreover,

the § 3553(a) concern with sentence disparity is not one that focuses on differences among defendants in an individual case, but rather is concerned with unjustified difference across judges or districts. *Id.* at 638. In fact, the focus on the differences among defendants in an individual case in which one defendant cooperates could actually increase sentence disparity, because the resulting lower sentence for the offense to redress that disparity will be out of sync with sentences in similar cases nationwide in which there were not multiple defendants or in which one did not cooperate. *Id.* As we noted in *Boscarino,* it makes no sense that one culprit should receive a lower sentence than an otherwise-similar offender, "just because the first is 'lucky' enough to have a confederate turn state's evidence." *Id.* The district court's approach does nothing to eliminate unwarranted disparity in sentences, and therefore is an improper application of the § 3553(a) factor. That is not to say that the district court could not impose the 60-month sentence; we express no opinion on that. Our holding is simply that the district court's sentence was based in part on an improper application of one factor of § 3553(a), and accordingly we vacate the sentence and remand for resentencing. The conviction is AFFIRMED, the sentence is VACATED, and the case is REMANDED for resentencing.

A true Copy:

Teste:

/s/ _____
Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Case No. 04-10028
LANCE PISMAN,	)	
Defendant.	)	

ORDER

(Filed December 09, 2004)

Defendant has filed a motion for reconsideration of the denial of his Rule 29(c) motion for judgment of acquittal on Count III. In consideration of that motion and the Government's response, IT IS ORDERED that the motion for reconsideration is DENIED.

Motions for reconsideration serve the limited function of allowing courts to correct manifest errors of law or fact or to consider newly discovered evidence. See *Russel v. Delco Remy Div. of Gen. Motors Corp.*, 51 F.3d 746, (7th Cir. 1995). "A motion for reconsideration performs a valuable function where the court has patently misunderstood a party . . . or has made an error not of reasoning but of apprehension." *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 49 F.3d 1263, 1267 (7th Cir. 1990). It allows the court to correct its own errors of law or fact, and thus avoid unnecessary appellate procedure. *Russel* at 749.

The thrust of Defendant's motion is that the court has made a manifest error of law and reasoning by sustaining the jury's guilty verdict on Count III by relying on a *Pinkerton* theory of liability, based upon a finding that the

jury could reasonably have found the existence of a conspiracy under Count I, although a different conspiracy than the one charged in that count, to support its guilty verdict on Count III.

If the court's understanding and application of the *Pinkerton* theory of liability in that regard is in error, in the court's mind the error is not patent or manifest to the extent the motion for reconsideration should be allowed. For those reasons, the motion for reconsideration is denied.

ENTERED this 9th day of December, 2004.

/s/ Joe B. McDade
JOE BILLY McDADE
Chief United States
District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Case No. 04-10028
LANCE PISMAN,	)	
Defendant.	)	

ORDER

(Filed November 01, 2004)

Before the Court is Defendant Lance Pisman's Motion for Acquittal on Count III or in the Alternative Motion to Renew Judgment of Acquittal (necessarily limited to Count III since Defendant was found not guilty as to Counts I and II). For the reasons that follow, the motion is DENIED in all respects.

* * *

Rule 29(c) Motion for Judgment of Acquittal on Count III

The thrust of Defendant's Rule 29(c) motion is that the not guilty verdict on the conspiracy charge in Count I is inconsistent with and precludes the guilty verdict on Count III which depends upon application of the *Pinkerton* doctrine to hold Defendant responsible for the acts of Wilkerson in procuring under age minors to engage in illicit sexual activity with him and Defendant. The *sine qua non* of the *Pinkerton* doctrine is the existence of a conspiracy and an act by one conspirator in furtherance of the conspiracy which is attributable to another conspirator. Since Defendant was found not guilty on the conspiracy count, he

contends that there is no legal basis to apply the *Pinkerton* doctrine. However, this is not necessarily true as discussed *infra*. However, there is no need to go that route since the short answer is that Defendant's contention has no support in the law as announced by the United States Supreme Court and the Seventh Circuit Court of Appeals.

"Inconsistent verdicts in a criminal case are not a basis for reversal of a conviction or the granting of a new trial." This has been longstanding law in the Seventh Circuit and most recently expressed in *United States v. Conn*, 297 F.3d 548, 557-58 (7th Cir. 2002).

> 'Inconsistent verdicts in a criminal case are not a basis for reversal of a conviction or the granting of a new trial.' *United States v. Reyes*, 270 F.3d 1158, 1168 (7th Cir. 2001). As the Supreme Court has held, 'inconsistent verdicts . . . should not necessarily be interpreted as a windfall to the government at the defendant's expense.' *United States v. Powell*, 469 U.S. 57, 65 (1984). The jury may have reached such a verdict 'through mistake, compromise or lenity.' *Id.* Accord, *United States v. Patterson*, 348 F.3d 218 (7th Cir. 2003); *United States v. Young*, 316 F.3d 649, 662 (7th Cir. 2002); *United States v. Conn*, 297 F.3d 548, 557-58 (7th Cir. 2002); *United States v. Reyes*, 270 F.3d 1158, 1168 (7th Cir. 2001); and *United States v. Costello*, 148 F.3d 770, 773 (7th Cir. 1998).

Whether the verdicts are inconsistent or not, the jury heard ample evidence on which to base its conviction. As discussed in the order denying the Rule 29(a) motion, there was sufficient evidence in the record for the jury to find the existence of the conspiracy charged in Count I. Even if we were to assume that the jury found that the

specific conspiracy charged in the Indictment was not proved, this would not preclude the jury from finding that another and different uncharged conspiracy existed, such as a conspiracy between Defendant and Wilkerson, without regard to the interstate travel element, that they would have sex on November 1, 2003, with two minors and that Wilkerson would procure the two minors on behalf of Defendant and in furtherance of that conspiracy. As discussed *infra*, there is overwhelming evidence in the record to support this scenario. On the basis of finding that this uncharged conspiracy existed, Defendant could be found liable on Count III under the *Pinkerton* doctrine for the acts of his co-conspirator, Wilkerson, in procuring Tyler Ashley and Lenny Palomares, two 15-year-old boys to engage in sexual activity with him and Wilkerson in violation of Illinois criminal law proscribing such sexual activity with a minor under 16 years of age. For Rule 29(c) purposes, the evidence was sufficient for a reasonable jury to find Defendant guilty beyond a reasonable doubt on Count III under the *Pinkerton* doctrine. For the above reasons, Defendant's Rule 29(c) motion is DENIED.

Defendant has also filed a Motion for a New Trial under Rule 33(a). In addition to challenging various evidentiary rulings of the Court, Defendant contends that the Government failed to prove him guilty beyond a reasonable doubt on Count III because the *Pinkerton* doctrine was not applicable due to the inconsistent verdicts previously discussed. In connection with this contention as a ground for a new trial, the Rule 33(a) motion is DENIED for the reasons stated herein. The other grounds for a new trial will be disposed of by separate order.

ENTERED this 29th day of October, 2004.

/s/ Joe B. McDade
JOE BILLY McDADE
Chief United States
District Judge

United States Court of Appeals
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

May 31, 2006

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee/ Cross-Appellant, Nos. 05-1625 & 05-1899 LANCE PISMAN, Defendant-Appellant/ Cross-Appellee	]]]]] v.]]]]]	Appeals from the United States District Court for the Central District of Illinois. No. 04 CR 10028 Joe Billy McDade, Judge.

ORDER

All of the judges on the original panel having voted to deny the Petition for Rehearing filed by Defendant-Appellant/Cross-Appellee on April 21, 2006, and no active judge having called for a vote,

IT IS HEREBY ORDERED that the petition for rehearing is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT
PEORIA, ILLINOIS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Case No. 04-10028
JACOB W. WILKERSON and LANCE PISMAN,	)	
Defendants.	)	

GOVERNMENT'S INSTRUCTION NO. 19A

A CONSPIRATOR IS RESPONSIBLE FOR OFFENSES COMMITTED BY HIS FELLOW CONSPIRATORS IF HE WAS A MEMBER OF THE CONSPIRACY WHEN THE OFFENSE WAS COMMITTED AND IF THE OFFENSE WAS COMMITTED IN FURTHERANCE OF AND AS A FORESEEABLE CONSEQUENCE OF THE CONSPIRACY.

THEREFORE, IF YOU FIND THE DEFENDANT GUILTY OF THE CONSPIRACY CHARGED IN COUNT 1 AND IF YOU FIND BEYOND A REASONABLE DOUBT THAT WHILE HE WAS A MEMBER OF THE CONSPIRACY, HIS FELLOW CONSPIRATOR COMMITTED THE OFFENSE IN COUNT 3 IN FURTHERANCE OF AND AS A FORESEEABLE CONSEQUENCE OF THAT CONSPIRACY, THEN YOU SHOULD FIND HIM GUILTY OF COUNT 3.

FEDERAL CRIMINAL JURY INSTRUCTION 5.09